No. 15771

In the
United States Court of Appeals
For the Ninth Circuit

CARL BEISTLINE,
Appellant,
vs.
CITY OF SAN DIEGO and GENERAL DYNAMICS CORPORATION,
Appellees.

Appellant's Reply Brief

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I.

INTRODUCTION

It seems that appellees in their brief have overlooked or deliberately ignored the purpose and function of Section I of the 14th Amendment to the Constitution of the United States. The provisions of that Section can be invoked only against states or their agencies and then only in instances where it is alleged that they have infringed, or are attempting to infringe, in some manner unlawfully upon the rights or property of citizens of the various states. Whenever said Section is invoked it is the crux of plaintiff's case and

never merely "an incidental involvement" of a federal law or statute. It is also true that whenever that Section is invoked it may be invoked in the federal courts, although it is equally true that it may be invoked in the courts of any of the states. The plaintiff has the option to decide which forum he shall use.

II.

ANALYSIS OF APPELLEES' POINTS

1. APPELLEES' POINT II.

Appellant has no quarrel with the proposition stated in appellees' Point II. Appellant believes, however, that he has sufficiently pointed out in his opening brief the adequacy of the pleadings to invoke the provisions of Section I of the 14th Amendment to the Constitution of the United States.

2. APPELLEES' POINT III.

The proposition stated under this point is not true, but even if it were true, it is entirely irrelevant. It is not and never has been the law that merely because the same facts might give rise to an action at common law based upon tort that a litigant cannot elect to rely upon a violation of a constitutional right as the basis for his action and sue in the federal courts. A similar contention was made in the case of *Home Telephone & Telegraph Company v. City of Los Angeles,* 227 U.S. 278, 33 Sup. Ct. 312, 57 L.Ed. 510. In that case the

defendant objected to the jurisdiction of the federal court on the ground that the plaintiff had a cause of action under the Constitution of the State of California and that therefore there was no need to invoke federal jurisdiction. The Supreme Court, however, disposed of this contention and held that even though it might be true that the plaintiff had a remedy under state law this did not militate against the invocation of federal jurisdiction where the complaint alleged actions by state officials which were also proscribed by the Federal Constitution. To the same effect are the cases of *Cuyahoga River Power Company v. City of Akron,* 240 U.S. 462, 36 Sup. Ct. 402, 60 L.Ed. 743; *Weaver v. Pennsylvania-Ohio Power & Light Co., et al.,* 10 F. 2nd 759; and *Portland Ry. Light & Power Co. v. City of Portland, et al.,* 181 Fed. 632, all cited and commented upon in appellant's opening brief.

Furthermore, it is not clear to the appellant that a state or one of its sub-divisions may be sued in a common law action for fraud or for duress as the appellees seem to indicate. As a matter of fact, the general rule is that a state or a sub-division thereof can be sued only with its consent, and appellant knows of no consent statute which is applicable to the facts of this case. Certainly under proper circumstances a state *may* use force in taking a citizen's property, but if the state oversteps the bounds of its authority as limited by the provisions of the 14th Amendment to the Constitution of the United States (or by the provisions of

cations for injunctive relief. However, the form of relief sought merely applies to the remedy and if the court did not have jurisdiction of the subject matter it would not have jurisdiction to render injunctive relief anymore than it would to give relief for a wrong already committed. In the particular case in which we are involved the appellant had no occasion for injunctive relief because the City of San Diego had not threatened to use appellant's property for an unauthorized use. Indeed, had the City at the time it took appellant's property made it clear that it intended to use said property for private use, the appellant might well have applied for injunctive relief, but the purpose did not become clear until after the property had been taken.

3. APPELLEES' POINT IV.

Appellant does not understand appellees' contention under this point, but it appears to be that since the property was not actually taken by judgment of condemnation the appellant's property was not actually "taken" by the appellee, City of San Diego. Appellant quotes as follows from appellees' brief: "It is equally apparent that any conduct which falls short of constituting an exercise of the power of eminent domain does not violate the constitution but at most will give rise to a civil remedy. Therefore, the question here is whether there was a 'taking' of appellant's property." Appellant believes that he has adequately

disposed of this contention under Point (A) in his opening brief. Appellant will therefore merely re-emphasize the fact that the allegations of his complaint make it clear that the conveyance to the City was not voluntary and amounted to a taking by force.

The cases cited by appellees under this point have no bearing upon the question involved because in none of these cases was the property of the plaintiff actually taken. In other words, it may be readily admitted, as claimed by appellees, that the mere threat to condemn one's property does not constitute a taking, or that proceedings having been commenced and abandoned do not constitute a taking, but appellant submits that a threat which actually accomplishes the taking of the property is an entirely different matter.

4. APPELLEES' POINT V.

The proposition stated under this point is not supported by any authority and appellant believes it to be entirely untrue. The case of *Thiriot vs. Santa Clara Elementary School District,* 275 P. 2d 833, 128 C.A. 2d 548 cited by the appellees under this heading merely involves the legal proposition that a judgment of a court that had jurisdiction of the subject matter, when it becomes final, cannot be set aside unless there is a showing of extrinsic fraud. We are not concerned with the question of the finality of any judgment in this case, but appellant believes that even if we were, this court should not be bound by the decision in the

Thiriot case. As appellees themselves point out, the contention that there was a violation of the due process clause of either the federal or state constitutions was not even raised in that case. We cannot speculate as to why constitutional provisions were not invoked, but can merely say that perhaps had they been, the result might have been different. The effect the appellees seek to give to that case would leave it within the power of a state to take the property of citizens for any purpose it wished by the mere expedient of setting forth in the complaint for condemnation a legitimate purpose, obtaining a judgment, allowing it to become final, and then turning right around and using the property for another and unauthorized purpose. Appellant does not believe that this is or should be the state of the law, but the possibility of such action on the part of a state makes evident the need and purpose of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

III.

CONCLUSION

Appellees in their brief have pointed out nothing which destroys the force or effect of the argument in appellant's opening brief. Appellant believes that he has stated a case in his complaint which shows that the appellees have infringed upon certain rights guaranteed appellant by the Constitution of the United

States and that he has properly invoked the provisions thereof in the United States District Court for the Southern District of California, and he therefore again respectfully submits that this Court should reverse the decision of the District Court and remand this case to the said Court for trial.

DATED: March 20, 1958.

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